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10/748,715	12/30/2003	Thomas Odorzynski	19197 (27839-2575)	2119
45736 7590 05/02/2011 Christopher M. Goff (27839) ARMSTRONG TEASDALE LLP 7700 Forsyth Boulevard Suite 1800 St. Louis, MO 63105				
EXAMINER				
DAGNEW, SABA				
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1 UNITED STATES PATENT AND TRADEMARK OFFICE  
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4 BEFORE THE BOARD OF PATENT APPEALS  
5 AND INTERFERENCES  
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8 *Ex parte* THOMAS ODORZYNSKI  
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11 Appeal 2010-004574  
12 Application 10/748,715  
13 Technology Center 3600  
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15  
16 Before ANTON W. FETTING, JOSEPH A. FISCHETTI, and  
17 BIBHU R. MOHANTY, *Administrative Patent Judges*.  
18 FETTING, *Administrative Patent Judge*.

19  
DECISION ON APPEAL

STATEMENT OF THE CASE<sup>1</sup>

Thomas Odorzynski (Appellant) seeks review under 35 U.S.C. § 134 (2002) of a final rejection of claims 1,3-8,10-18,20,22,24-29,and 31-33, the only claims pending in the application on appeal. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b) (2002).

The Appellant invented a way of using diapers as an advertising medium (Specification 1:21-22).

An understanding of the invention can be derived from a reading of exemplary claim 1, which is reproduced below [bracketed matter and some paragraphing added].

1. A method of advertising, the method comprising:  
[1] selling space on a disposable diaper to a sponsor; and  
[2] placing an ad for a product other than disposable diapers onto the disposable diaper.

The Examiner relies upon the following prior art:

Gabler	US 5,481,758	Jan. 9, 1996
Iwamoto	WO 03/028496 A1	Apr. 10, 2003

Claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32 stand rejected under 35 U.S.C. § 102(b) as anticipated by Gabler.

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<sup>1</sup> Our decision will make reference to the Appellant's Appeal Brief ("App. Br.," filed September 11, 2009) and Reply Brief ("Reply Br.," filed January 13, 2010), and the Examiner's Answer ("Ans.," mailed December 9, 2009).

Claims 4, 5, 7, 10, 11, 13, 18, 24, 27, 29, and 33 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Gabler and Iwamoto<sup>2</sup>.

## ISSUES

The issue of anticipation turns on whether a diaper is an undergarment.

## FACTS PERTINENT TO THE ISSUES

The following enumerated Findings of Fact (FF) are believed to be supported by a preponderance of the evidence.

### *Facts Related to the Prior Art*

#### *Gabler*

01. Gabler is directed to a garment having a message on the outer surface. Gabler 1:9-10.
02. Gabler describes how its messages are not limited to outer garments but can also be applied to clothing normally seen only in private including underwear. Gabler 2:57-60.
03. Gabler's Fig. 3 displays a commercial message, implying the space for the message was sold as advertising.

#### *Iwamoto*

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<sup>2</sup> Although the heading for this rejection excludes claim 33, the analysis for the rejection of claim 33 is included under this heading in both the Final Rejection and Answer. We take the omission from the heading as a typographic error.

04. Iwamoto is directed to a novel advertising medium using a detachable advertisement display for clothing. Iwamoto Abstract.

#### ANALYSIS

*Claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32 rejected under 35 U.S.C. § 102(b) as anticipated by Gabler.*

We are unpersuaded by the Appellant's argument that Gabler fails to describe a disposable diaper. Appeal Br. 4-6. Gabler describes applying messages to undergarments such as underwear. This is clearly a genus for which disposable diapers would be a species. Whether disposable diapers are constructed differently than other forms of underwear as the Appellant contends is not pertinent to the issue of whether a diaper is a garment worn under other clothing. Similarly, whether the means for attaching a message would be structurally different for diapers as the Appellant contends is not pertinent as no means is claimed and the claims do not recite attachment, but merely placement onto the diaper.

We are also unpersuaded by the Appellant's argument that MPEP § 2131.02 states that a description of a genus does not necessarily anticipate a species. Reply Br. 2. There are a limited number of types of undergarments, compared to the many variations of chemical formulas cited in MPEP § 2131.02. Accordingly, one would have immediately envisaged diapers as among those garments worn under clothing by extremely young children.

*Claims 4, 5, 7, 10, 11, 13, 18, 24, 27, 29, and 33 rejected under 35 U.S.C. § 103(a) as unpatentable over Gabler and Iwamoto.*

We are unpersuaded by the Appellant's arguments that art fails to describe the claimed structure of a disposable diaper. As the Examiner found, the structure does not affect one's ability to simply place a message somewhere upon a diaper, and the structure recited of an absorbent pad, bodyside liner, and liquid impermeable backsheet, is known by ordinary consumers, much less those of ordinary skill, to be that of many conventional disposable diapers.

#### CONCLUSIONS OF LAW

The rejection of claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32 under 35 U.S.C. § 102(b) as anticipated by Gabler is proper.

The rejection of claims 4, 5, 7, 10, 11, 13, 18, 24, 27, 29, and 33 under 35 U.S.C. § 103(a) as unpatentable over Gabler and Iwamoto is proper.

#### DECISION

To summarize, our decision is as follows.

- The rejection of claims 1, 3, 6, 8, 12, 14-17, 20, 22, 25, 26, 28, 31, and 32 under 35 U.S.C. § 102(b) as anticipated by Gabler is sustained.
- The rejection of claims 4, 5, 7, 10, 11, 13, 18, 24, 27, 29, and 33 under 35 U.S.C. § 103(a) as unpatentable over Gabler and Iwamoto is sustained.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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